Supreme Court, U. S.
FILED
JUN 17 1980
MICHAEL RODAK, JR., CLERK

No. 79-1985

IN THE

Supreme Court of the United States

October Term, 1979

ROGER A. JOURDAIN and MARGARET E. JOURDAIN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

Roger A. Jourdain and Margaret E. Jourdain, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on March 19, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, on appeal from the United States Tax Court is reprinted as Appendix A hereto, page A-1. The decision is as yet unreported. The opinion of the United States Tax Court is reported in 71 T.C. 980 and is reprinted as Appendix B hereto, page A-5.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit (Appendix A, page A-1), was entered on March 19, 1980, no rehearing was sought and no extension of time to petition for certiorari was sought. The jurisdiction of the Court is envoked under Title 28, USC 1254.

QUESTION PRESENTED

Is the income received by a noncompetent Indian[1] member of the Red Lake Band of Chippewa Indians, derived from lands held in trust by the United States pursuant to the Act of January 14, 1889, 25 Stat. 642 and Agreement entered into under the provisions of said Act with the members of the Red Lake Band for allotment in severalty to its members in conformity with the General Allotment Act of 1887, 24 Stat. 388, exempted from Federal income taxation under the tax exemption provisions of the General Allotment Act until a patent in fee simple is issued to an Indian Allottee.

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[1] A noncompetent Indian is one who lacks the legal capacity to alienate tribal land alloted to him under the provisions of the General Allotment Act. The term does not denote mental incapacity (Court of Appeals Opinion, App. A-3, ftn. 5).

STATUTES INVOLVED

1. General Allotment Act of 1887, 24 Stat. 388, 25 USC 331, et seq., the pertinent text of which appears in Appendix C hereto, page A-21.

2. Act of Congress of January 14, 1889, 25 Stat. 642, entitled "An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota." The pertinent text of which appears in Appendix D hereto, page A-28.

3. Act of Congress of May 18, 1916, 39 Stat. 137, the pertinent text of which appears in Appendix E hereto, page A-32.

STATEMENT OF THE CASE

Petitioners, Roger A. Jourdain and Margaret E. Jourdain, are husband and wife and filed joint income tax returns for the years 1971 and 1972 with the Internal Revenue Service. Petitioners are duly enrolled members of the Red Lake Band of Chippewa Indians and reside on the Red Lake Indian Reservation in northwestern Minnesota. Since 1959, Roger A. Jourdain has served as Chairman of the Tribal Council of the Red Lake Band of Chippewa Indians and in that capacity Jourdain received salaries in 1971 and 1972 of $15,750.00 and $18,000.00, and excess of allowable expenses of $266.92 and $290.38, respectively. The Tribal Council of the Red Lake Band withheld both income tax and FICA tax from Jourdain's income. The funds used to pay Jourdain's salary and expenses were paid out of monies disbursed to the Tribe by the Bureau of Indian Affairs from trust funds held by the United States Government for the benefit of the members of the Red Lake Band.[2]

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[2] Court of Appeals Opinion, Appendix A, page A-1.

The lands of the Red Lake Indian Reservation consisted of lands that were reserved for allotments in conformity with the General Allotment Act of 1887, 24 Stat. 388 (App. C, page A-21) pursuant to the Act of January 14, 1889, 25 Stat. 642 (App. D, page A-28) and Agreement made with the Red Lake Band Indians pursuant to the Act of 1889 (App. F, page A-37).

By the Indian Appropriations Act of May 18, 1916, 39 Stat. 137 (App. E, page A-32), a forest reserve was created out of timberlands constituting part of the Red Lake Reservation that had been reserved for allotment. The Act provided that the forest be administered by the Secretary of Interior and that the Secretary of Interior be authorized to sell therefrom the mature and marketable timber and after payment of expenses in connection with the administration of said forest, the net proceeds of all sales should be covered into the treasury of the United States to the credit of the Red Lake Indians and draw interest at the rate of four percent per annum. During the tax years involved, in addition to the revenue derived from the timber sales under the 1916 Act, there was also covered into the treasury of the United States in trust for the benefit of the Red Lake Band under the caption of "Indian moneys, proceeds of labor" pursuant to 25 USC 155 at four percent interest pursuant to 25 USC 161b revenue derived directly from the Reservation lands reserved for allotments in the form of proceeds from leases, timber stumpage sales, royalties from sale of fish and gravel sales. (Pet. Ex. 10, 11, 12, Ct. of Appeals, Jt. App. pp. 83-133; testimony Maus, Superintendent, Bureau of Indian Affairs, Red Lake Agency, Ct. of Appeals, Jt. App. pp. 160-196). It was from these trust funds that moneys were released by the United States upon request of the Tribal Council to the members of the Red Lake

Band, the beneficiaries or potential allottees for whom the lands had been reserved for allotment (Pet. Ex. 8, 9, Ct. of Appeals, Jt. App. pp. 74-82, testimony Oliver, Treasurer, Red Lake Band, Ct. of Appeals, Jt. App. pp. 147-158). It was from these trust funds derived directly from the land reserved for allotments that Petitioner, Roger A. Jourdain, as a member of the Red Lake Band and one of the potential allottees received his income from the Red Lake Band during the tax years involved by authorization of the Tribal Council, the representative governing body of the members of the Red Lake Band and with the approval of the Secretary of Interior. (Ex. 3-C, Constitution and Bylaws, Red Lake Band, Ct. of Appeals, Jt. App. pp. 136-146). The Red Lake Band Constitution adopted by its members made effective by its terms upon approval by the Secretary of Interior (Article XI, Ct. of Appeals, Jt. App. p. 65) provides in Article VII, Section 1 (b) (Ct. of Appeals, Jt. App. p. 63):

> "The Tribal Council of the Red Lake Band shall prepare annual budget requests for the advancement to the control of the Band such money as now or may hereafter be deposited to the credit of the Band in the United States Treasury or which may hereafter be appropriated for the use of the Band."

The United States Tax Court held that the income derived by Petitioner, Roger A. Jourdain, from the lands reserved for allotment is taxable income and the United States Court of Appeals for the Eighth Circuit affirmed the Tax Court judgment.

REASONS FOR ALLOWING THE WRIT

A review on a Writ of Certiorari should be granted because of conflict between the decision of the United States Court of Appeals in this case and the decision of the United States Supreme Court in *Squire v. Capoeman*, 351 U.S. 1, 76 S. Ct. 611, 100 L.Ed. 883 (1956). In *Capoeman* the Court held that income of a noncompetent Indian derived from allotted tribal land held in trust by the United States under the provisions of the General Allotment Act of 1887[3] was exempted from Federal income taxation. In arriving at its decision the Court stated that the promise of the United States contained in Section 5 of the General Allotment Act to convey at the end of the trust period to the Indian Allottee a patent in fee simple "free of all charge or encumbrance whatsoever" as further enforced by the amendment to Section 6 of the Act proviso:

> "That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to issuing of such patent. . . ."

evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee.[4]

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[3] Appendix C, page A-21.
[4] *Squire v. Capoeman*, 351 U.S. pp. 7-8.

Under the provisions of Section 1 of the Act of 1889[5] a Commissioner was appointed to negotiate with the Red Lake Reservation Indians for a cession of their reservation lands "as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes. . . ." and under the provisions of Section 3 of the Act of 1889 the lands of the Red Lake Indian Reservation reserved by the Commissioners for allotment were to be allotted in severalty to the Red Lake Indians on Red Lake Reservation "in conformity with the Act of February eighth, eighteen hundred and eighty-seven, entitled 'An Act for the Allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes;. . . .'"

Pursuant to the Act of 1889, the Indians of the Red Lake Reservation entered into an agreement with the Commission appointed under the Act for a cession of their lands which recited that they "do hereby accept and consent to and ratify the said Act and each and all of the provisions thereof" and which agreement excluded from the cession, lands embraced within described boundaries which "have been reserved by the Commissioners appointed under said Act and as therein authorized for the purpose of making and filling allotments therein provided for."[6]

The lands of the Red Lake Band of Chippewa Indians, presently known as the Red Lake Indian Reservation, consist of lands that were reserved for allotments to be made in severalty to the Red Lake Indians in conformity with the

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[5] Appendix D, page A-28.
[6] Appendix F, page A-37.

General Allotment Act of 1887, pursuant to the provisions of the Act of 1889 and Agreement with the Red Lake Indians. *Chippewa Indians v. United States*, 80 Ct. Cls. 410, 439 (1935), affirmed 301 U.S. 358, 57 S.Ct. 826, 81 L.Ed. 1156 (1937).

As stated in *Minnesota v. Hitchcock*, 185 U.S. 373, 377-379 (1902):

> "Under the 1889 Act, a Commission was appointed and an agreement made with the Indians for a cession of a large part of the Red Lake Indian Reservation, which agreement was approved by the President, March 4, 1890, the unceded portion being reserved by the Commissioners 'for the purpose of making and filling the allotments' provided for in the Act."

No allotments in severalty have as yet been made of the Red Lake Reservation lands, reserved for allotments by the Act of 1889 and Agreement with the Indians, because the Red Lake Indians have thus far opposed the present making of such allotments and the administrative officers did not consider it practicable to make them. *Chippewa Indians v. United States, supra*, 301 U.S. p. 368, 80 Ct. Cls. p. 446. In addition, before any allotments were made, Congress passed the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461 et seq. precluding further allotments.

In support of its opinion that income from unallotted tribal land is taxable the Court of Appeals relies upon *Holt v. Commissioner*, 364 F.2d 38, 41 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967); *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978); *Commissioner v. Walker*, 326 F.2d 261 (9th Cir. 1964). In none of these cases was the unallotted tribal land from which the income was derived held in trust by the United States under an Act

of Congress (Act of 1889) and Agreement with the Tribal Indians involved (Appendix F, page A-37) for allotment in severalty to the tribal members in conformity with the General Allotment Act of 1887. In *Holt*, 364 F.2d p. 41, the Court states:

> "In our present case, no statute or treaty has been found which gives taxpayer any title or right to acquire title in tribal land nor are any rights conferred upon the individual Indian by tribal constitution."

In *Fry*, 557 F.2d, p. 650, the Court states:

> "Appellants can point to no treaty or Act of Congress that grants an exemption which is applicable to their case. . . ."

In *Walker*, 326 F.2d, p. 264, the Court states:

> "In reaching a conclusion of nontaxability the Tax Court did not refer to language in any treaty or Act of Congress which exempts the income in question from taxation. The brief of respondents contains no such reference and this court has been unable to find any such reference."

No differentiation can be made between land that is allotted to an individual Indian and the land reserved in trust for allotment in conformity with the General Allotment Act of 1887. The legal consequences are the same. Land that is allotted is still held in trust by the United States Government for the benefit and use of the Indian to whom the allotment is ultimately to be made. The allotted land cannot be sold or conveyed during the term of the trust. The same legal consequences of land held in trust for allotment on the Red Lake Reservation exists. All of the land of the Red Lake Band is held in trust by the United States Government for the purpose

of making allotments under the General Allotment Act of 1887 to the members of the Red Lake Band. That land cannot be sold or conveyed by the Red Lake Band without consent of the trustee. The Court of Appeals failed to consider this similarity and instead chose to reason that since the Red Lake lands were not yet allotted, the tax exemption does not apply.

The allocation of the members of the Red Lake Band of the revenue derived directly from their reservation lands reserved for allotment, amongst themselves should not effect the exemption from taxation upon receipt of a portion of the non-taxable revenue by one of its members. The Red Lake Band members should not be penalized by removal of the exemption from federal income taxation when a portion of the non-taxable revenue is of necessity distributed to tribal Indian members who are officers and employees of the tribe for the purpose of achieving the status of self-sufficiency, rather than on a per-capita basis. If the revenues were distributed on a per-capita basis, there would be no tribal government and no progress towards the status of self-sufficiency. The Red Lake Band in this case is utilizing to its best advantage the revenue from the land Congress has declared tax exempt. Such utilization clearly falls within the Congressional intent that Indians improve themselves economically so that they may take their rightful place in society.

The failure of the Court of Appeals to apply the determination of the Supreme Court that income received by a noncompetent Indian derived from lands held in trust by the United States under the General Allotment Act of 1887 were tax-exempted under the provisions of the Act until a patent in fee simple was issued to an Indian allottee, has resulted in a decision which is in conflict with the decision of this Court, which this Court should correct on a review by certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari shall be granted.

Dated June 9, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1622

ROGER A. JOURDAIN and MARGARET E. JOURDAIN,
Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPEAL FROM THE UNITED STATES TAX COURT.

Submitted: February 14, 1980
Filed: March 19, 1980

Before LAY, Chief Judge; BRIGHT, Circuit Judge, and SCHATZ, District Judge.*

PER CURIAM.

Roger and Margaret Jourdain[1] (Jourdain) appeal from a decision of the Tax Court that they owe federal income tax deficiencies for the years 1971 and 1972 in the amounts of $3,202.98 and $3,549.91, respectively. On appeal Jourdain contends principally that the Tax Court erred as a matter of law in holding that his income as chairman of the tribal council of the Red Lake Band of Chippewa Indians (the

* ALBERT G. SCHATZ, United States District Judge, District of Nebraska, sitting by designation.

[1] Margaret Jourdain is a party to this appeal solely by reason of her filing joint tax returns with her husband.

Tribe) is taxable under the Internal Revenue Code. We disagree. Accordingly, we affirm the Tax Court judgment.

The relevant facts in this case are undisputed. Jourdain is a duly enrolled member of the Tribe and resides on its reservation in northwestern Minnesota. Since 1959, he has served as chairman of its tribal council. In that capacity, Jourdain received salaries in 1971 and 1972 of $15,750 and $18,000, respectively.[2] He also received reimbursement funds from the tribal council that exceeded his allowable expenses for 1971 and 1972 in the amounts of $266.92 and $290.38, respectively. Jourdain's salary and expenses were paid out of monies disbursed to the Tribe by the Bureau of Indian Affairs from trust funds held for the Tribe's benefit. The trust funds consisted of tribal receipts from royalties, leases, and other sources, together with accrued interest earned on the funds while held in trust by the Government.

Jourdain failed to report both his tribal and his nontribal income[3] on his tax returns for 1971 and 1972. The Internal Revenue Service audited those returns and assessed deficiencies on the basis of the unreported income. Jourdain then petitioned the Tax Court for a redetermination of his tax liability.

Jourdain contends that the General Allotment Act of 1887[4] (General Allotment Act) exempts his income as tribal chairman from taxation. To support this argument, Jourdain relies on *Squire v. Capoeman*, 351 U.S. 1 (1956). In *Capoeman*, the

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[2] The tribal council withheld both income and social security taxes from Jourdain's salary.

[3] Jourdain received income from nontribal sources amounting to $2,605 in 1971 and $2,245 in 1972. On appeal he does not claim an exemption from taxes for these items of income.

[4] Act of February 8, 1887, ch. 199, § 1 *et seq.*, 24 Stat. 388 (codified at 25 U.S.C. § 331 *et seq.* (1976)).

Court held that capital gain income of a noncompetent Indian[5] derived from allotted tribal land was tax-exempt under provisions of the General Allotment Act. Jourdain argues that because his tribal income derives from reservation land *reserved* for allotment, even though unallotted, it should likewise be tax-exempt.[6]

The Tax Court held, however, that the *Capoeman* exemption applies only to income derived from allotted land. *Jourdain v. Commissioner*, 71 T.C. 980, 989 (1979). This holding was correct. We have previously considered and rejected the argument that the exemption recognized in *Capoeman* extends to income derived by a noncompetent Indian from unallotted tribal land. *Holt v. Commissioner*, 364 F.2d 38, 41 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967). *See also Fry v. United States*, 557 F.2d 646 (9th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *Commissioner v. Walker*, 326 F.2d 261 (9th Cir. 1964).

Jourdain argues next that subjecting his income to taxation constitutes "molestation from the United States" prohibited by article V of the Treaty with the Tribes of Indians of Greenville, August 3, 1795, 7 Stat. 49. He also contends that the Constitution's references to "Indians not taxed" in Art. I, § 2, and Amend. 14, § 2, similarly prohibit the taxation of

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[5] A noncompetent Indian is one who lacks the legal capacity to alienate tribal land allotted to him under provisions of the General Allotment Act. The term does not denote mental incapacity. A noncompetent Indian holds property under a trust patent and may not dispose of it without the approval of the Secretary of the Interior. *Stevens v. Commissioner*, 452 F.2d 741, 742 n.1 (9th Cir. 1971). Jourdain does not possess a certificate of competency.

[6] The Tribe's revised constitution and bylaws prohibit the allotment of its land. In addition, the Act of June 18, 1934, ch. 576, § 1 *et seq.*, 48 Stat. 984 (codified at 25 U.S.C. § 461 *et seq.* (1976)), terminated the allotment process initiated by the General Allotment Act.

Indians whose tribes were recognized at the time the Constitution was ratified. Finally, Jourdain contends that the Internal Revenue Code does not apply to Indians because it contains no express statement that Indians fall within its intended scope.

The Tax Court held that the "molestation" prohibited by the Treaty of Greenville was interference with the rights of Indians to hunt and otherwise enjoy their land, not the "right" to be free from federal taxation. It also held that constitutional references to "Indians not taxed" merely reflect the fact that some Indians were not taxed by the states in which they resided; the references do not restrain the federal government from taxing Indians. Finally, the Tax Court noted that Indians are subject to federal income tax unless specifically exempted by treaty or statute. *See, e.g., LaFontaine v. Commissioner,* 533 F.2d 382 (8th Cir. 1976).

We agree with those conclusions. Accordingly, we affirm the Tax Court judgment on the basis of its thorough and well-reasoned opinion. *Jourdain v. Commissioner,* 71 T.C. 980 (1979).

A true copy.

Attest: CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

71 T.C. No. 87
UNITED STATES TAX COURT

ROGER A. JOURDAIN AND MARGARET E. JOURDAIN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 6021-76. Filed March 8, 1979.

Held, a noncompetent Indian is taxable on compensation received as chairman of the tribal council from funds which had their source in receipts and revenues that the tribe as a whole derived directly from tribal lands. *Walker v. Commissioner,* 37 T.C. 962 (1962), affd. in part, revd. in part 326 F.2d 261 (9th Cir. 1964), no longer followed. *Held, further,* petitioner not liable for negligence penalty.

Rodney J. Edwards, for the petitioners.

Robert F. Cunningham, for the respondent.

IRWIN, *Judge:* Respondent determined deficiencies in petitioners' income tax and additions thereto as follows:

		Addition to Tax	
Year	*Deficiency*	*Sec. 6651(a)*	*Sec. 6653(a)*
1971	$3,231.63		$161.58
1972	3,549.91	$49.62	177.50

Due to a concession by respondent, the issues remaining for our consideration are: (1) whether income received by petitioner, Roger A. Jourdain, from the Red Lake Band of Chippewa Indians Tribal Council for services rendered as its tribal chairman and other income earned by petitioner from private sources constitute taxable income or whether such

items are exempt from income tax, and (2) whether the additions to tax under sections 6651(a) and 6653(a)[1] were properly imposed.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts, together with the exhibits attached thereto, are incorporated herein by this reference.

Petitioners, Roger A. and Margaret E. Jourdain, husband and wife, filed joint income tax returns using the cash method of accounting for the years 1971 and 1972 with the Internal Revenue Service Center, Ogden, Utah. Petitioners resided at the Red Lake Indian Reservation, Red Lake, Minnesota at the time their petition herein was filed. Because Margaret Jourdain is a petitioner herein solely by reason of her filing jointly with her husband, all references hereafter to petitioner are solely to Roger Jourdain.

Petitioners maintained their legal residence at Red Lake Indian Reservation, Red Lake, Minnesota at all times material to this case. Both petitioners were and remain duly enrolled members of the Red Lake Band of Chippewa Indians. However, petitioners do not possess certificates of competency from the United States Government.[2]

The Red Lake Band of Chippewa Indians is an American Indian tribe. A Peace Treaty known as the Treaty of Greenville between the United States and several Indian tribes including the Chippewas was signed on August 3, 1795. The Treaty provided, in pertinent part, as follows:

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[1] All statutory references are to the Internal Revenue Code of 1954, as in effect during the taxable years in issue.

[2] A noncompetent Indian, as the term is used here, is one who holds allotted lands only under a trust patent and may not dispose of his property without the approval of the Secretary of the Interior. The term does not denote mental incapacity. *Stevens v. Commissioner*, 452 F.2d 741, 742, n.1, (9th Cir. 1971), affg. in part and revg. in part 52 T.C. 330 (1969), supplemented by 54 T.C. 351 (1970).

ARTICLE V.

Indians have right to hunt on lands relinquished by U.S. & c.

To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.

ARTICLE VI.

Indians may expel settlers from their lands.

If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit; and because such settlements made without the consent of the United States, will be injurious to them as well as to the Indians, the United States shall be at liberty to break them up, and remove and punish the settlers as they shall think

proper, and so effect that protection of the Indian lands herein before stipulated.

ARTICLE VII.

Indians may hunt on lands ceded to U.S.

The said tribes of Indians, parties to this treaty, shall be at liberty to hunt within the territory and lands which they have now ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States.

ARTICLE VIII.

Trade to be opened with the Indians.

Trade shall be opened with the said Indian tribes; and they do hereby respectively engage to afford protection to such persons, with their property, as shall be duly licensed to reside among them for the purpose of trade, and to their agents and servants; but no person shall be permitted to reside at any of their towns or hunting camps as a trader, who is not furnished with a license for that purpose, under the hand and seal of the superintendant of the department north-west of the Ohio, or such other person as the President of the United States shall authorise to grant such licences; to the end, that the said Indians may not be imposed on in their trade. And if any licensed trader shall abuse his privilege by unfair dealing, upon complaint and proof thereof, his licence shall be taken from him, and he shall be further punished according to the laws of the United States. And if any person shall intrude himself as a trader, without such license, the said Indians shall take and bring him before the superintendant or his deputy, to

> be dealt with according to law. And to prevent impositions by forged licences, the said Indians shall at least once a year give information to the superintendant or his deputies, of the names of the traders residing among them.

The Red Lake Band is located on the Red Lake Indian Reservation (hereafter Reservation) within the boundaries of the State of Minnesota. The Reservation consists of approximately 750,000 acres of common tribal land held in trust by the United States Government for the benefit of the Red Lake Band. The jurisdiction of the Red Lake Band extends to all land on the Reservation in Minnesota. The Red Lake Band's governing body consists of eight district representatives and three officers (chairman, secretary, and treasurer) who make up the elected representatives of the tribal council. Petitioner has continuously served as council chairman since his first election to that office in 1959 through the date of trial of this case (March 1977).

At all relevant times, the Red Lake Band possessed the right of self-government. Its revised constitution and bylaws provide, in pertinent part, that "All reservation land shall remain tribal property and shall neither be sold or divided by allotment." Consequently, tribal property cannot be alienated or transferred by the Red Lake Tribal Council or any member of the Red Lake Band.

Other than a land-use permit issued to him by the Red Lake Band Council for a homesite and garden on the Red Lake Indian Reservation, petitioner, during the years at issue or at any time material herein, has never been the recipient of an allotment, as that term is commonly understood under the provisions of the General Allotment Act of 1887 (25

U.S.C.A. sec. 331, et seq.),[3] or by reason of any agreement or treaty.

The tribal council has the authority, subject to limitations imposed by its constitution or laws of the Federal Government, to administer any funds within the control of the Red Lake Band, including payment of salaries and expenses of tribal officers or employees. All such salaries and expenses were authorized by resolution duly enacted by the Red Lake Band. The funds used to pay petitioner's salary were advances disbursed from trust funds held by the United States Government for the Red Lake Band. The trust fund consists of tribal receipts from royalties, leases, and other sources together with accrued interest earned on the tribal funds while held in trust by the Government.[4] These funds were distributed after approval by the Secretary of Interior through the Bureau of Indian Affairs (BIA), Red Lake Agency accounting office, by issuing checks to the Red Lake Band tribal treasurer in response to the tribal council's quarterly budget request, approved by tribal resolution, for operating funds. The budget request specified the amount the tribe was to receive for the administration of the tribal council. The funds were then disbursed by the treasurer of the Red Lake Band Council for operating expenses of the

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[3] Under this Act, Indians were to be allotted lands on their reservations not to exceed 160 acres of grazing lands or 80 acres of agricultural land; 25 years after allotment the allottees were to receive the lands discharged of the trust under which the United States had theretofore held them, and to obtain a patent "in fee, discharged of said trust and free of all charge or incumbrance whatsoever," though the President might extend the period. The trust period has regularly been extended by Executive Order. See also 25 U.S.C.A. sec. 462 which provides that "the existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress."

[4] It appears that the Government retains 10 percent of the tribe's timber royalties as administration expenses.

council, including officers' salaries. It was impossible to identify what part of the trust funds distributed to the tribe constituted principal and what part constituted interest earned on the principal while held in trust.

During the years 1971 and 1972, the tribal council paid petitioner income identified as chairman's salary in the amounts of $15,750 and $18,000, respectively. The tribal council withheld both income tax and FICA tax from petitioner's wages, and petitioner will be entitled to receive Social Security benefits when he becomes eligible. In addition to his salary as chairman, petitioner received funds totaling $266.92 and $290.38 in 1971 and 1972, respectively, from the tribal council in excess of his allowable employee business and travel expenses incurred on behalf of the tribal council. Petitioner did not include these amounts in gross income on either his 1971 or 1972 income tax returns.

Petitioner received additional income of $2,420 and $2,245 in 1971 and 1972, respectively, identified as consultant and executive fees from Rural Minnesota CEP, Inc., Detroit Lakes, Minnesota, which he also did not report as gross income in either year. Petitioner also received income of $175 in 1971 from the University of Minnesota and $10 in 1971 from the State of Minnesota, Department of Indian Affairs, which he did not report on his 1971 income tax return.

Respondent determined that petitioner's salary earned as chairman, the additional income he earned as consulting and executive fees from Rural Minnesota CEP, the amounts earned from the University of Minnesota and the Minnesota Department of Indian Affairs, and the excessive reimbursement for travel expenses incurred on behalf of the Red Lake Band Council constitue taxable income.

ULTIMATE FINDING OF FACT

Petitioner's failure to file income tax returns and to pay the taxes due was due to reasonable cause and not the result of negligence or intentional disregard of rules and regulations.

OPINION

Petitioner first argues that because there is no specific reference to income taxation of Indians in either the Internal Revenue Code of 1954 or any prior revenue act, Indians are exempt from its operation. Alternatively, petitioner argues that because the compensation he received as tribal chairman was paid solely from income received by the Red Lake Band from the sale or lease of resources from their Reservation, the income is exempt from Federal income taxes under Article 1, Section 2, Clause 3 of the United States Constitution, the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C.A. section 331, et seq. and the Treaty of Greenville, dated August 3, 1795, 7 Stat. 49. Respondent maintains that Indians are subject to income tax unless specifically exempted; that neither the Constitution, General Allotment Act, nor Treaty of Greenville exempts petitioner from paying Federal income taxes; and, therefore, petitioner must include all compensation in income.

In support of his contention that because there is no specific reference to income taxation of Indians in either the Internal Revenue Code of 1954 or any prior revenue act, Indians are excluded from its operation, petitioner relies on the rule as stated in *Elk v. Wilkins*, 112 U.S. 94, 100 (1884), that "general acts of Congress [do] not apply to Indians, unless so expressed as to clearly manifest an intention to include [Indians]."

The starting point for our analysis is *Walker v. Commissioner*, 37 T.C. 962 (1962), revd. in pertinent part 326 F.2d

261 (9th Cir. 1964).[5] In *Walker*, the question presented us was whether a noncompetent Indian was taxable on compensation received as elected treasurer of the tribal community out of funds which had their source in receipts and revenues that the tribe as a whole derived directly from "tribal lands" (i.e., those portions of the reservation which had not yet been allotted to particular Indians but which were held by the Government for the use and benefit of the tribe as a whole). The facts in the present case are not distinguishable. In both instances, the recipient of compensation was a noncompetent Indian living on an Indian reservation; the compensation was to a member of the tribal council which had a large measure of responsibility for deciding how revenues were to be disbursed; the tribal land had not been allotted to any particular Indians but was held by the Government in trust for the use and benefit of the tribe as a whole; and the funds used to pay the taxpayer had their source in receipts and revenues which the tribe as a whole derived directly from tribal lands held by the Government in trust for the use and benefit of the tribe.[6]

We did not base our holding in favor of the taxpayer in *Walker* upon any treaty or upon the General Allotment Act, but rather by emphasizing the guardian-ward relationship

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[5] Petitioner does not argue on brief that our decision in *Walker v. Commissioner, supra,* should be controlling here. Nonetheless, since we find the facts in this case to be indistinguishable from the facts in *Walker v. Commissioner,* we must deal with that case.

[6] Some of the funds used to pay petitioner here were derived from interest these funds earned while held in trust by the government. Respondent contends that if we find petitioner's salary to be tax-exempt because it was derived directly from tribal lands, nonetheless, the interest factor is taxable as reinvestment income under the rationale that interest income derived from investment of surplus funds from land is not exempt income. Because we hold that petitioner's salary is taxable, we need not deal with this particular refinement. Cf. *Superintendent of Five Civilized Tribes v. Commissioner,* 295 U.S. 418 (1935).

existing between the United States and non-competent Indians. We found that the amount paid to the treasurer was in reality a distribution to him as one of the beneficiaries of the trustee tribal funds and "the mere fact that such amount was fixed by reference to his services as community treasurer does not warrant a characterization of the same as 'wages' * * *." *Walker v. Commissioner*, 37 T.C. at 972.

We no longer believe this reasoning is valid and we hold that the theory of the guardian-ward relationship upon which we relied in *Walker* is no longer a consideration in the tax status of Indians.

We agree, therefore, with respondent that petitioner must show that he is specifically entitled to an exemption from taxation. In *Squire v. Capoeman*, 351 U.S. 1, 6 (1956), the Supreme Court stated that "Indians are citizens and * * * in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." The cases following *Squire v. Capoeman* have since maintained that Indians are subject to income tax unless "exempted" by treaty or Act of Congress. *LaFontaine v. Commissioner*, 533 F.2d 382 (8th Cir. 1976), affg. T.C. Memo. 1975-165;[7] *Holt v. Commissioner*, 364 F.2d 38 (8th Cir. 1966), cert. den. 386 U.S. 931 (1967), affg. 44 T.C. 686 (1965); *Commissioner v. Walker*, 326 F.2d 261 (9th Cir. 1964), affg. in part, revg. in part 37 T.C. 962 (1962); *Estate of Shelton v. Commissioner*, 68 T.C. 15, 21 (1977), on appeal to the Tenth Circuit, Aug. 19, 1977. See also *Superintendent of Five Civilized Tribes for Sandy Fox, Creek No.*

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[7] In *LaFontaine v. Commissioner*, T.C. Memo. 1975-165, affd. 533 F.2d 382 (8th Cir. 1976), we relied on this language to hold that Article VI of the United States Constitution does not exempt wages earned by a certified member of the Turtle Mountain Band of Chippewa Indians from a private employer.

1268 v. Commissioner, 295 U.S. 418 (1935); *Choteau v. Burnet*, 283 U.S. 691 (1931). Therefore, the rule of *Elk v. Wilkins* has been modified, and it is now quite clear, as pointed out by the Court of Appeals in reversing our decision in *Walker*, that:

> A general Act of Congress applying to all persons includes Indians and their property interests. Sections 1 and 61(a) * * * subject to income of 'every individual' to tax, and include income 'from any source whatever' that is not elsewhere specifically excluded. Because the Internal Revenue Code is a general Act of Congress, it follows that Indians are subject to payment of federal income taxes, as are other citizens, unless an exemption from taxation can be found in the language of a Treaty or Act of Congress. [*Commissioner v. Walker, supra*, at 263.] [Citation omitted.]

See also *Estate of Shelton v. Commissioner, supra*; *Holt v. Commissioner, supra.*[8]

Petitioner's next argument is that U.S. Const. art. 1, sec. 2, cl. 3 is, in conjunction with U.S. Const. amend. XIV, sec. 2, a constitutional limitation on Congress' power to tax Indians who were not taxed at the time the Constitution was ratified (at least as to those tribes identified as such at that time).

Congress' power to levy taxes is subject to certain limitations, including art. 1, sec. 2, cl. 3, which states, in part:

> direct taxes shall be apportioned among the several States which may be included within this Union, accord-

[8] Some courts have at times recognized a limited exception to the rule that a general Act of Congress applying to all persons includes Indians. See e.g., *United States v. White*, 508 F.2d 453 (8th Cir. 1974), where the court noted that areas traditionally left to tribal self-government and most often the subject of treaties have enjoyed an exception from this general rule. Clearly, taxation would not come within this exception.

> ing to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a term of Years, *and excluding Indians not taxed*, three fifths of all other Persons * * *. [Emphasis supplied.]

This clause also provided that apportionment in the House of Representatives was to be on the same basis as the apportionment of direct taxes. The 14th Amendment, Section 2, later amended this by providing, in pertinent part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, *excluding Indians not taxed* * * * [Emphasis supplied.]

Petitioner contends that the phrase "*excluding Indians not taxed*" provides the Constitutional limitation on taxing Indians who were not taxed at the time the Constitution was ratified. Although respondent apparently concedes that the Red Lake Band constitutes Indians who were identified in the United States Constitution as Indians not taxed at the time of its adoption, he contends that the phrase "Indians not taxed" does not restrain the Federal Government from taxing Indians but refers only to state taxation of Indians.[9]

We believe that the clause in Article I is an apportionment provision designed to establish the method of computing the number of representatives for each state and determine apportionment of direct taxes among the states. The phrase "Indians not taxed" when viewed in context is clearly descriptive, describing the fact that some Indians are not taxed by the state in which they reside and should, therefore, be ex-

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[9] In *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970), it was held that the State of Minnesota did not have the power to impose a state income tax on the Red Lake Band, at least as to income derived from sources within the reservation.

cluded from the enumeration of its population. It does not restrain the Federal Government from taxing Indians.[10]

Petitioner next relies on *Squire v. Capoeman, supra,* in which the Supreme Court interpreted the General Allotment Act of 1887 to exempt certain income of an Indian from Federal taxation. *Squire v. Capoeman* is distinguishable from the present case. There, the Court held only that proceeds from the sale of standing timber on a parcel of reservation land that had been allotted to a noncompetent Indian resident of the reservation and held in trust under the General Allotment Act were not subject to Federal income tax. Since there has been no allotment of land to petitioner here, the exemption does not by its terms apply. *Fry v. United States,* 557 F.2d 646, 648 (9th Cir. 1977), cert. den. 434 U.S. 1017 (1978).

Even if we assume that it is not necessary to actually allot the land under the Supreme Court's decision in *Squire v. Capoeman* in order to exempt income, see *United States v. Anderson,* 442 F.Supp. 10 (D. Mont. 1977), and that under the General Allotment Act income directly derived from tribal lands is not taxable either to the tribe or to a member of the tribe who receives his derivative, pro rata share of such tribal income, we do not believe petitioner has established that he is entitled to have his income exempt from taxation. Cf. *Choteau v. Burnet, supra*; *Big Eagle v. United States,* 300 F.2d 765 (Ct. Cl. 1962). Petitioner's salary did not represent his pro rata share of tribal income. Rather, his wages were solely for his benefit, obtained through his labor, and we do not believe, therefore, that his wages were directly derived from the land. Nonetheless, petitioner argues that his management of tribal land is a necessary part of deriving

[10] See *United States v. Kagama,* 118 U.S. 375, 378 (1886); *Elk v. Wilkins,* 112 U.S. 94 (1884).

(tax exempt) income from the land, and that to tax his income from management of the land is to thereby indirectly tax the land itself. However, it does not follow that income received by an employee as compensation for services rendered the tribe is tax exempt because the income earned by the tribe through (in part) his services is tax exempt. *Fry v. Commissioner, supra*; *Walker v. Commissioner, supra.* We conclude, therefore, that no Act of Congress prevents taxation in this instance.

Nor do we believe that the Treaty of Greenville prohibits imposition of the Federal income tax on petitioner's wages and other income received. Petitioner relies on Article V of the Treaty which states:

> To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States, and until such sale, the United States will protect all the said Indian tribes in their quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. * * *

Petitioner emphasizes the phrase "without any molestation from the United States" and contends that imposition of an income tax would involve an unwarranted intrusion by the United States into Indian affairs.

We do not believe that the language quoted above expresses any intention of exempting the Red Lake Band from taxation.

This is especially true when the language of Article VII is compared to the language in Article V:

> The said tribes of Indians, parties to this treaty, shall be at liberty to hunt within the territory and lands which they have now ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States.

It is apparent that the molestation the parties had in mind was interference in the Indians' rights to hunt, etc., not the right to be free from taxation. Although ambiguities in treaties are to be resolved in favor of Indians, we are not free to create favorable rules, and the Supreme Court has applied the rule that tax exemptions are not granted by implication to Indians. See *Fry v. Commissioner, supra.* Accordingly, we hold that petitioner may not exclude his income from taxation.

We must now deal with the sections 6651(a) and 6653(a) additions.

Petitioner does not set forth any reason for late filing or failure to report consulting fees, honorariums, and excessive reimbursements for travel expenses, relying entirely upon his contention that such amounts (including the wages received as chairman) were excludable from gross income. We infer from this that the only reason petitioner filed a return was to obtain a refund of taxes withheld from his salary as chairman, no return otherwise being required if his income was tax-exempt. Presumably, because no tax was withheld from petitioner's income except for his salary, he did not report any additional income. In determining whether the additions to tax under sections 6651(a) and 6653(a) were properly imposed, the issue is thus the narrow one of whether peti-

tioner's belief that his income was tax-exempt, although mistaken, was reasonable.

In view of our position in *Walker v. Commissioner, supra,* we have no problem in finding that petitioner was reasonable in his belief that his salary as chairman was tax-exempt, and respondent does not contend otherwise. Once petitioner assumed that his salary as chairman was exempt, his other income was insufficient in the aggregate amount to be subject to income tax in 1972. Therefore, we hold that petitioner is not liable for the additions to tax in 1972.

This is not the case for 1971, however, and petitioner's income aside from his salary as tribal chairman is sufficient in amount to be taxed.[11] Nonetheless, because of the special status of the Red Lake Band and petitioner's apparently sincere, albeit erroneous, belief that the United States Constitution and the Treaty of Greenville protected any member of the Red Lake Band living on the Reservation from Federal taxation of income derived from any sources, we hold for petitioner on this issue in 1971.

Decision will be entered under Rule 155.

Reviewed by the Court.

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[11] Petitioner's other income for 1971 totaled $2,871.92 ($266.92 excess reimbursement; $2,420 consulting fee; $175 from University of Minnesota; and $10 from the Minnesota Department of Indian Affairs). The low income allowance in 1971 for a joint return was $1,050 and petitioner was entitled to two exemptions (his and his wife's) worth a total of $1,350. This results in taxable income of $471.92.

APPENDIX C

General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by Act of May 8, 1906, 34 Stat. 182

Feb. 8, 1887.

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

President authorized to allot land in severalty to Indians on reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

Note — balance of Section 1 and Sections 2 through 4 omitted as not pertinent.

Patent to issue.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be

To be held in trust.

Conveyance in fee after 25 years.

Provisos.

Period may be extended.

Laws of descent and partition.

allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration

Negotiations for purchase of lands not allotted.

Lands so bought to be held for actual settlers if arable.

Patent to issue only to person taking as homestead.

of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter

Purchase money to be held in trust for Indians.

Religious organizations.

Indians selecting lands to be preferred for police, etc.

in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Note — Section 6, as amended by Act of May 8, 1906, 34 Stat. 182.

May 8, 1906.
[H. R. 11946.]

[Public No. 149.]

CHAP. 2348.—An Act to amend section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Lands in severalty to Indians.
Vol. 24, p. 390, amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

Citizenship rights to allottees on issue of fee simple title.

"SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every

allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said

Provisos.
Restrictions removed.

land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory."

Jurisdiction in trust patents continued.

Indian Territory not included.

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

Fee simple patents to allottees' heirs.

Sale of.

Disposal of proceeds.

Note — Sections 7 through 11 omitted as not pertinent. Approved February 8, 1887.

APPENDIX D

Act of January 14, 1889, 25 Stat. 642

January 14, 1889.

CHAP. 24 — An act for the relief and civilization of the Chippewa Indians in the State of Minnesota.

Chippewa Indians of Minnesota. Commissioners to negotiate for relinquishment of lands to be appointed.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservations, if made and assented to in writing

Lands excepted.

Assent of tribes.

by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect: *Provided further*, That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the

Proviso. Allottees not to be disturbed.

Census to be taken.

Assent to extinguish Indian title.

Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

Note — Section 2 omitted as not pertinent.

Removal of Indians to White Earth Reservation.

SEC. 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and

Allotment of lands on Red Lake Reservation.

Vol. 24, p. 388.

all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however,* That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further,* That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to an taking such allotment on White Earth Reservation.

Prior allotments confirmed. *Provisos.*

Deductions.

Allotments on other reservations.

Note — Sections 4 through 8 omitted as not pertinent.

Approved January 14, 1889.

APPENDIX E

Part of Section 9 of the Act of May 18, 1916, 39 Stat. 123

May 18, 1916.
[H. R. 10385.]
39 Stat., 123.

CHAP. 125. — An Act Making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seventeen.

Indian Department appropriations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and in full compensation for all offices and salaries which are provided for herein for the service of the fiscal year ending June thirtieth, nineteen hundred and seventeen, namely:

Red Lake Indian Forest, created.
25 Stat., 645, vol. 1, 303.

To carry into effect the Act entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota, approved January fourteenth, eighteen hundred and eighty-nine, to provide for the establishment and administration of a forest reserve and for the sale of timber within the Red Lake Indian Reservation, Minnesota," that the following-

described lands within the Red Lake Indian Reservation, Minnesota, be, and the same hereby are, created into a forest reserve, to be known as the Red Lake Indian Forest: Townships one hundred and fifty and one hundred and fifty-one north, ranges thirty-two, thirty-three, thirty-four, thirty-five, and thirty-six west, and townships one hundred and fifty-two and one hundred and fifty-three north, ranges thirty-two, thirty-three, and thirty-four west of the fifth principal meridian, except the lands in townships one hundred and fifty-one north, range thirty-six west, which lie north of the north line of sections twenty-six to thirty, inclusive, and except all lands within sections four, five, six, seven, eight, nine, and eighteen, in township one hundred and fifty-three north, range thirty-four west. The provisions of this paragraph shall not apply to any lands which have heretofore been reserved for school, agency, church, or town-site purposes or granted to private parties or corporations within the area described, nor to the town site of Red Lake, for the creation of which provision is made herein: *Provided,* That when any of said lands are no longer needed for the purpose for which they are reserved, the Secretary of the Interior may declare such lands to be a part of the Red Lake Indian Forest.

Description.

Reservation, etc., lands excluded.

Proviso. Subsequent additions.

That lands within said Red Lake Indian forest, which are not covered with standing and growing merchantable pine timber and which

Nontimber lands allotted to Indians.

are suited for the production of agricultural crops and which are fronting upon a lake shore, may be allotted to individual Lake Red Indians: *Provided*, That no such allotment shall exceed eighty acres nor have more than eighty rods fronting upon a lake shore: *Provided further*, That in case an Indian has improved and cultivated more than eighty acres, his allotment may embrace his improvements to the extent of one hundred and sixty acres.

Provisos. Restrictions.

Improvements.

That said forest shall be administered by the Secretary of the Interior in accordance with the principles of scientific forestry, with a view to the production of successive timber crops thereon, and he is hereby authorized to sell and manufacture only such standing and growing pine and oak timber as is mature and has ceased to grow, and he is also authorized to sell and manufacture from time to time such other mature and marketable timber as he may deem advisable, and he is further authorized to construct and operate sawmills for the manufacture of the timber into merchantable products and to employ such persons as he shall find necessary to carry out the purposes of the foregoing provisions, including the establishment of nurseries and the purchase of seeds, seedlings, and transplants when needed for reforestation purposes: *Provided*, That all timber sold under the provisions herein shall be sold on what is known as the bank scale: *Provided further*, That no contract shall be made for the establishment of any mill, or to carry on

Forest administration.

Sawmills, etc.

Nurseries for reforesting.

Provisos. Sales. Estimates, etc., required.

any logging or lumbering operations which shall constitute a charge upon the proceeds of the timber, until an estimate of the cost thereof shall have first been submitted to and approved by Congress.

Permits and leases allowed. Conditions.

That the Secretary of the Interior may issue permits or grant leases on such lands for camping or farming. No permit shall be issued for a longer term than one year and no lease shall be executed for a longer term than five years. Every permit or lease issued under authority of this Act to Indians, or to other persons or corporations, and every patent for an allotment within the limits of the forest created by section one, shall reserve to the United States the right to cross the land covered thereby with logging roads or railroads, to use the shore line, or to erect thereon and use such structures as shall be necessary to the proper and economical management of the Indian Forest created by this Act; and the Secretary of the Interior may reserve from allotment tracts considered necessary for such administration.

Net proceeds to credit of Red Lake Indians.

After the payment of all expenses connected with the administration of these lands as herein provided, the net proceeds therefrom shall be covered into the Treasury of the United States to the credit of the Red Lake Indians and draw interest at the rate of four per centum per annum. The interest on this fund may be used by the Secretary of the Interior in such manner as he shall consider most advantageous and bene-

Use of interest.

ficial to the Red Lake Indians. Expenditure from the principal shall be made only after the approval by Congress of estimates submitted by the said Secretary.

Indian townsite to be reserved, etc.

That the Secretary of the Interior shall select and set apart an area not exceeding two hundred acres, in sections twenty, twenty-one, twenty-eight, and twenty-nine, township one hundred and fifty-one north, range thirty-four west, cause the lands thus selected to be surveyed and platted into suitable lots, streets, and alleys, and dedicate said streets and alleys and such lots and parcels as he may consider necessary to public uses. The lands thus selected shall not be allotted but held as an Indian town site subject to further legislation by Congress.

Timber outside of forest.
Disposal of, etc.

That the timber on lands of the Red Lake Indian Reservation outside the boundaries of the forest created by this Act may be sold under regulations prescribed by the Secretary of the Interior, and the proceeds administered under the provisions of the general deficiency Act of March third, eighteen hundred and eighty-three (Twenty-second Statutes at Large, page five hundred and ninety), and the Indian appropriation Act of March second, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page four hundred and sixty-three).

22 Stat., 590, vol. 1, 31.

24 Stat., 463, vol. 1, 36.

Note — other provisions of the Act omitted as not pertinent.

APPENDIX F

Agreement negotiated with the Red Lake Indians and United States, pursuant to Act of January 14, 1889, 25 Stat. 642.

Reproduced from *Chippewa Indians v. United States*, 80 Ct.Cls. 410 pp. 439-40 (1935)

Reporter's Statement of the Case

XVI. The agreement so negotiated with the tribes or bands of Chippewa Indians occupying and belonging to the Red Lake Reservation is as follows:

"We, the undersigned, being male adult Indians over eighteen years of age, of the tribes or bands of Chippewa Indians occupying and belonging to the Red Lake Reservation, in the State of Minnesota, do hereby certify and declare that we have heard, read, interpreted, and thoroughly explained to our understanding, the act of Congress approved January 14, 1889, entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota' (Public, No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof, and do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said Red Lake Reservation as is not embraced in the following described boundaries, to wit:

"Commencing at the point on Thief River where the same crosses the line between Marshall and Polk Counties, thence easterly to the most northwesterly point of the upper Red Lake, thence easterly along the northerly shore of said upper Red Lake to a point due north of a point 1 mile east from the easterly end of the lower Red Lake, thence due south to the last-named point, thence southwesterly in a straight line to a point on Hay Creek 1 mile from where said creek enters the lower Red Lake, thence south to a point from which a line extending west passes midway between what is called the 'big marsh' and the sugar bush north of and nearest to said marsh, said sugar bush being on the Red Lake and White Earth Road; thence west along said line between said marsh and sugar bush to Clear Water River, said line being supposed to be about 6 miles south of the lower Red Lake; thence northwesterly along said Clear Water River to the point where said river crosses the boundary of Red Lake Reservation as the same has heretofore existed, thence along said reservation line to the place of beginning, as designated on a map published in 1888 by Rand, McNally & Co., of Chicago, Ill. (but all waterways within the reservation above described are to be free for commercial purposes to all citizens of the United States), for the purposes and upon the terms stated in said act, which said lands embraced within the foregoing boundaries have been reserved by the commissioners appointed under said act and as therein authorized for the purpose of making and filling the allotments therein provided for.

"Witness our hands and seals hereto subscribed and affixed at the Old Red Lake Agency, on the Red Lake Reservation, in the State of Minnesota, this 8th day of July 1889.

"HENRY M. RICE, [Seal]
"JOSEPH B. WHITING, [Seal]
"Commission.

"B. P. SHULER,
"United States Indian Agent.

"W. C. HUBBELL,
"Secretary to Commission."

No.	Indian name	English name	Age	Mark and seal
1	May-Dway-Gah-No-Nind	He that is spoken to	82	His (x) mark, seal.
2	Nah-Gon-E-Gwon-Abe	Leading Feather	71	Do.
3	Mays-Co-Co-Naw-Ay	Moose Dung	64	Do.
4	Ah-Nah-Me-Ay-Ge-Shig	Praying Day	63	Do.
	(And 243 other Indian signatures.)			

Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1985

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROGER A. JOURDAIN AND MARGARET E. JOURDAIN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented in this federal income tax case is whether petitioner's[1] salary, earned as Chairman of the Tribal Council of the Red Lake Band of Chippewa Indians, is exempt from tax, on the authority of the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (Pet. App. A-21 to A-27).

The pertinent facts are undisputed and may be summarized as follows: During the taxable years at issue, the funds used to pay petitioner's salary as Chairman of the Tribal Council were derived from a trust fund held by

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[1]Margaret E. Jourdain is a party to this action solely because she filed joint returns with her husband for 1971 and 1972. "Petitioner" refers solely to Roger A. Jourdain.

the United States Government for the benefit of the Red Lake Band of Chippewa Indians. This trust fund consisted of tribal receipts from royalties, leases, and other sources, together with the interest earned on such funds. Distributions were made to the Tribe by the Department of the Interior, Bureau of Indian Affairs, in response to the Tribal Council's quarterly budget request, which specified the amount the Tribe needed for its salary and other administrative expenses (Pet. App. A-2, A-10 to A-11). Although petitioner was issued a land-use permit for a homesite and garden on the reservation, he has never been the recipient of an "allotment" as that term is used in the General Allotment Act of 1887 (Pet. App. A-3, A-9 to A-10). The Tribe's revised constitution and bylaws, in fact, prohibited the allotment of its land (Pet. App. A-3, A-9).

On audit, the Commissioner of Internal Revenue determined that petitioner's salary was subject to federal income tax. Petitioner thereupon brought this suit in the Tax Court for redetermination of the resulting deficiencies. In a reviewed decision, the Tax Court held that petitioner's salary was not exempt (Pet. App. A-5 to A-20). In so ruling, the Tax Court noted that the reservation land was not allotted to individual Indians and that, in any event, petitioner's wages were not "directly derived" from the land (Pet. App. A-17). The court of appeals affirmed (Pet. App. A-1 to A-4).

1. The decision below correctly held that petitioner's salary was subject to tax. Like all other citizens, Indians are subject to federal income taxation unless exempt by statute or treaty. *Superintendent* v. *Commissioner*, 295 U.S. 418, 421 (1935). The treaties and Acts of Congress pertinent to petitioner's claim are typical of those under which the government agrees to hold title to reservation land in trust for the members of a tribe and which confer certain tax exemptions relating to the lands.

As this Court observed in *Squire* v. *Capoeman*, 351 U.S. 1, 9 (1956), " 'It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom,' " quoting from F. Cohen, *Handbook of Federal Indian Law* 265 (1941). Whether income is directly derived from land or from some other source is essentially a question of fact. Where the income derives from the production, severance, or extraction of the land's natural resources, the land is the fundamental and direct source of income so that the income is exempt. See, *e.g.*, *Squire* v. *Capoeman*, *supra* (sale of timber); *Big Eagle* v. *United States*, 300 F. 2d 765 (Ct. Cl. 1962) (production of minerals). On the other hand, the courts have uniformly held that the exemption is not available simply because in some indirect or minor way the income is related to tax-exempt land. See, *e.g.*, *Commissioner* v. *Walker*, 326 F. 2d 261 (9th Cir. 1964) (tribal official's salary paid out of revenues derived from land); *Fry* v. *United States*, 557 F. 2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (payments to Indian logger who worked on reservation land); *Holt* v. *Commissioner*, 364 F. 2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967) (profits received from ranching activities conducted on tribal land); *Critzer* v. *United States*, 597 F. 2d 708 (Ct. Cl.), cert. denied, No. 79-86 (Oct. 16, 1979) (profits derived from operation of a restaurant, motel and gift shop located on tribal land); *Beams* v. *United States*, 294 F. Supp. 1218 (E.D. Okla. 1968), aff'd per curiam, 417 F. 2d 197 (10th Cir. 1969) (income derived from the reinvestment of royalties).

Here, the record amply supports the conclusion of both courts below that petitioner's salary was not derived from tax-exempt land. To the contrary, petitioner received the income in question solely as compensation for his personal services as Chairman of his Tribal Council.

Accordingly, it is taxable to him regardless of its ultimate source. Section 61(a) of the Internal Revenue Code of 1954 (26 U.S.C.); *Commissioner* v. *Walker*, *supra*, 326 F. 2d at 261. See also *Choteau* v. *Burnet*, 283 U.S. 691, 694 (1931).[2]

2. Contrary to petitioner's argument (Pet. 6, 10), the decision below does not conflict with *Squire* v. *Capoeman*, *supra*. In *Squire*, the Court held that proceeds from the sale of timber cut from allotted lands were exempt from federal income tax. But as subsequent decisions have made clear, the rule of *Squire* does not apply to *un*allotted tribal land as involved in this case. See *Holt* v. *Commissioner*, *supra*, 364 F. 2d at 40-41; *Fry* v. *United States*, *supra*, 557 F. 2d at 649. Compare *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935).[3] In any event, as previously noted, *Squire* does not exempt from taxation payments from the

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[2]Petitioner argues (Pet. 8-9) that *Walker*, *Fry* and *Holt* are distinguishable because they did not involve income from unallotted land held in trust by the government pursuant to an Act of Congress. But those cases stand for the proposition that the General Allottment Act does not apply unless reservation land is, in fact, allotted to individual Indians. The mere fact that the Red Lake Band of Chippewa Indians may have taken certain preliminary (and ultimately unsuccessful) steps toward that end in 1889 does not trigger the Act's operation in the absence of a formal allotment. And without such an allotment, there can be no exemption.

[3]Contrary to petitioner's claim (Pet. 9), the distinction between allotted and unallotted lands is significant. The General Allotment Act required the government to deliver a fee interest in tribal land to an Indian allottee (when he was judged competent) "free of all charge or incumbrance whatsoever" (Pet. App. A-22). Thus, the purpose of the allotment system was to provide Indians with unencumbered land on which they could achieve self-sufficiency. For that reason, this Court held in *Squire* v. *Capoeman*, *supra*, that income derived directly from allotted land could not be taxed. Here, in the absence of any allotted land, there is no reason to exempt petitioner from taxes that are imposed on all other citizens. See *Board of Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943).

tax-exempt funds to an individual, for personal services not directly related to deriving the income from tax-exempt lands.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DOJ-1980-07